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January 18, 2005

T.R.A. DOCKET ROOM

*IN RE: BellSouth's Motion For The
Establishment of a New Performance Plan*

)
) Docket No. 04-00150
)
)

RESPONSE OF COMPSOUTH TO BELL SOUTH'S MOTION TO COMPEL

The Competitive Carriers of the South, Inc. ("CompSouth") submits the following response to the "Motion to Compel Discovery" filed by BellSouth Telecommunications, Inc. ("BellSouth").¹

Initially, CompSouth notes that BellSouth has purported to file discovery upon competitive, local exchange carriers who have not intervened in this case and are not parties to this proceeding. Neither the rules of the TRA nor the Tennessee Rules of Civil Procedure permit BellSouth to serve interrogatories or requests for the production of documents upon non-parties. See T.R.C.P. 33.01 ("A party may serve upon any other party written interrogatories." Emphasis added.) See T.R.C.P. 34.01 ("Any party may serve upon any other party a request" to produce documents. Emphasis added.) The rule is the same under the Federal Rules of Civil Procedure. "Rule 34 is available only to party litigants." Thomas v. Nuss, 353 F.2d 257, 258 (6th Circuit, 1965) citing Hickman v. Taylor, 329 U.S. 495 (1947) holding that, "Rule 34, like Rule 33, is limited to the parties to the proceeding."

¹ This response replies to the "Motion to Compel" filed against CompSouth and to the similar motions filed against individual CompSouth members

Second, as CompSouth has previously noted in its objections, BellSouth cannot require CompSouth to produce information or make responses on behalf of individual members. CompSouth can only be required to respond as CompSouth and to provide such information which is in the possession of CompSouth. See TRA Docket 98-00559, Pre-Hearing Officer's Order of July 1, 1999, at 3 (affirmed by Order of the Authority, February 2, 2000)² BellSouth has not responded to this precedent. The company says only that, "CompSouth and its members cannot make themselves immune from discovery by litigating 'in a group.'" That statement misses the point. CompSouth itself is a corporation, a legal entity separate and distinct from those carriers who belong to it. The members are not litigating "as a group." They are not litigating at all. CompSouth is the only litigant, other than BellSouth, in this case. It has a right to participate in this proceeding just as the United States Telecommunications Association has a right to participate — and often does participate — in litigation before the FCC and does so without being forced to respond to discovery on behalf of its hundreds of individual members, such as BellSouth.

In regard to BellSouth's Motion to Compel filed against CompSouth, it appears that all but four of the interrogatories (1 -11, 15 and 17) request member-specific information that is not in the possession of CompSouth and that CompSouth cannot be compelled to answer. Questions 12, 13, 14, and 16 ask for CompSouth's positions on issues. CompSouth has responded to Question 14 (although BellSouth apparently did not notice the response) and will respond to Questions 12, 13, and 16 as CompSouth develops its arguments in this case. Similarly, BellSouth's requests for documents, nos. 1 through 5 and 8, ask for member-specific information. CompSouth has responded to request no. 6 and is working on a response to no. 7.

² More recently, the Hearing Officer in Docket 04-0034 similarly denied a Motion to Compel filed by the Chattanooga Gas Company requesting member-specific information from the Chattanooga Manufacturers Association. Order of July 10, 2004, at p 5

Finally, CompSouth notes that BellSouth's overall strategy in this proceeding is to turn this case on its head. BellSouth has filed a performance measures and penalties plan and is presumably prepared to support it with evidence at a hearing. In discovery, however, the company seems to take the attitude that it is the responsibility of other carriers, not BellSouth, to prove that performance measures are needed and to justify the amount of any penalties based on the amount of damages caused by BellSouth's poor performance.

BellSouth's approach is akin to a utility which files for a rate increase and then, instead of trying to prove that it needs additional revenue, tries to force its customers to prove that they cannot afford to pay more for service.

The TRA spent two years or more developing its own performance measure and penalties plan (see Docket 01-00193) without requiring competitive carriers to prove "damages." The issues were (1) how should BellSouth's performance be measured ie., how granular should the metrics be, and (2) how large should the penalties be in order to provide BellSouth an incentive to improve performance and deter backsliding.


With few exceptions, the discovery questions posed by BellSouth do not relate to either of those two issues. BellSouth's questions are intended rather to force competing carriers to prove BellSouth's case based on irrelevant criteria.

For these reasons, the Motion to Compel should be denied.

Respectfully submitted,

BOULT, CUMMINGS, CONNERS & BERRY, PLC

By: _____



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing is being forwarded via U.S. mail, postage prepaid, to:

Guy Hicks
BellSouth Telecommunications
333 Commerce Street
Nashville, TN 37201-3300

on this the 18th day of January 2005.



Henry M. Walker